



BARNSTABLE, SS.

SUPERIOR COURT OF MASSACHUSETTS

BARNSTABLE, SS

Filed

JAN 29 2019

THE TRIAL COURT
SUPERIOR COURT DEPT.

SCOTT SMITH

Scott W. Nelson Clerk

Plaintiff,

Civil Action No. 1872-CV-00404

v.

JPMORGAN CHASE BANK, NA AND
HARMON LAW OFFICES, PC

Defendants.

**EMERGENCY MOTION TO ENTER PROTECTIVE ORDER, STAY DISCOVERY AND
REMOVE DEFAULT ORDER**

Defendant JPMorgan Chase Bank, N.A. ("Chase" or "Defendant"), moves pursuant to Massachusetts Superior Court Rule 9A(e)(1), that this Honorable Court enter a protective order staying discovery until after this Court has ruled on Chase's Motion to Dismiss. Chase represents that Plaintiff refused to assent to Chase's request to stay discovery until after Chase's Motion to Dismiss had been ruled upon.

Chase also requests that this Honorable Court accept Chase's Motion to Stay for its review and filing in the above referenced matter. Chase further represents that its requests should be granted on the following grounds.

1. Plaintiff filed the instant suit by filing his Complaint on or about July 30, 2018.
2. Defendant removed the matter to the United States District Court for the District of Massachusetts on August 7, 2018. Pursuant to an Order of the United States District Court dated September 25, 2018, this matter was subsequently remanded to this Court.

3. On December 14, 2018 Chase served Plaintiff with a Motion to Stay Discovery pursuant to Superior Court Rule 9A. Chase provided a courtesy copy via email on December 13, 2018. See Motion to Stay Discovery attached hereto.

4. On December 19, 2018, Defendant served Plaintiff with a Motion to Dismiss pursuant to Superior Court Rule 9A. The basis for Defendant's Motion to Dismiss is that Plaintiff lacks standing to bring his claims as they were forfeited by virtue of his bankruptcy discharge, among other defenses to the case.

5. On December 21, 2018, Plaintiff's counsel requested an additional two weeks to serve a response to Chase's Motion to Dismiss Plaintiff's First Amended Complaint, and similarly enlarge the time to serve a response to Chase's Motion to Stay Discovery.

6. By agreement, Defendant initially provided Plaintiff until January 21, 2019 to serve an opposition to Chase's Motion to Dismiss Plaintiff's First Amended Complaint and Chase's Motion to Stay Discovery. By agreement, Defendant provided an additional ten (10) days until January 31, 2019.

7. On January 2, 2019, counsel for Chase received a copy of Plaintiff's Application for Final Judgment pursuant to Massachusetts Rules of Civil Procedure, Rule 33(a) that was filed on December 28, 2019. Plaintiff did not provide prior notice of this filing despite the fact he was in receipt of both a Motion to Stay Discovery and a Motion to Dismiss, both served pursuant to Superior Court Rule 9A. Additionally, Plaintiff knowingly requested additional time to respond to the motions until January 21, 2019.

8. The effect of Plaintiff's Application Requesting Final Judgment, filed after Plaintiff requested additional time to respond to the Motion to Dismiss and the Motion to Stay Discovery, is that this Court would not reach Chase's motions prior to this Court being presented with Plaintiff's Request for Final Judgment.

9. The Court entered a Default Order on January 3, 2019, which Defendant received on January 10, 2019.

10. At this juncture in the litigation, the entrance of a Default Order for failure to respond to Plaintiff's discovery requests is premature as Chase emailed the Plaintiff a courtesy copy of Chase's Motion to Stay Discovery on December 13, 2018 with a mailed copy on December 14, 2018.

11. Chase requests relief from the instant Default Order due to Chase's outstanding motions, currently in possession of Plaintiff. It would be inequitable to allow the Default Order to stand at this point in the litigation with a Motion to Dismiss and a Motion to Stay pending, which have not yet reached the Court despite being in the possession of Plaintiff.

12. Chase has presented meritorious arguments in both its Motion to Stay Discovery and its Motion to Dismiss. Counsel for Chase has further acted in good faith throughout the case by providing opposing counsel the accommodation of additional time to respond to Chase's motions.

13. Despite Chase granting Plaintiff until January 21, 2019, with an additional extension until January 31, 2019, Plaintiff nevertheless moved forward and filed his Application Requesting Final Judgment, unknown to counsel for Chase, which effectively would preclude Chase from having its motions heard by this Court. As a result, this is a grave injustice considering Chase's agreement in good faith to provide Plaintiff with additional time to respond to its Motion to Dismiss and Motion to Stay.

9. The Court entered a Default Order on January 3, 2019, which Defendant received on January 10, 2019.

10. At this juncture in the litigation, the entrance of a Default Order for failure to respond to Plaintiff's discovery requests is premature as Chase emailed the Plaintiff a courtesy copy of Chase's Motion to Stay Discovery on December 13, 2018 with a mailed copy on December 14, 2018.

11. Chase requests relief from the instant Default Order due to Chase's outstanding motions, currently in possession of Plaintiff. It would be inequitable to allow the Default Order to stand at this point in the litigation with a Motion to Dismiss and a Motion to Stay pending, which have not yet reached the Court despite being in the possession of Plaintiff.

12. Chase has presented meritorious arguments in both its Motion to Stay Discovery and its Motion to Dismiss. Counsel for Chase has further acted in good faith throughout the case by providing opposing counsel the accommodation of additional time to respond to Chase's motions.

13. Despite Chase granting Plaintiff until January 21, 2019, with an additional extension until January 31, 2019, Plaintiff nevertheless moved forward and filed his Application Requesting Final Judgment, unknown to counsel for Chase, which effectively would preclude Chase from having its motions heard by this Court. As a result, this is a grave injustice considering Chase's agreement in good faith to provide Plaintiff with additional time to respond to its Motion to Dismiss and Motion to Stay Discovery.

14. Undersigned counsel, on a number of occasions, requested that Plaintiff withdraw his request for final judgment pending this Court hearing the Motions to Dismiss and to Stay Discovery. Plaintiff refused.

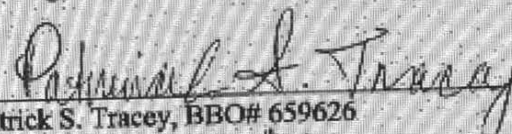
WHEREFORE, Chase respectfully requests that this Honorable Court grant the following relief:

1. Enter a protective order staying discovery until forty-five (45) days after this Court has ruled on Chase's Motion to Dismiss;

2. Vacate the Default Order entered pursuant to Massachusetts Rules of Civil Procedure, Rule 33(a);
3. Chase requests a hearing on this matter; and,
4. Grant such other relief this Court deems just.

Respectfully Submitted,

PARKER IBRAHIM & BERG LLP
Attorneys for Defendant,
JPMorgan Chase Bank, N.A.,


Patrick S. Tracey, BBO# 659626
One Financial Center, 15th Floor
Boston, MA 02111
Phone: 617.918.7613
Facsimile: 617.918.7878
Email: patrick.tracey@piblaw.com

Dated: January 11, 2019

PARKER IBRAHIM & BERG LLP

Patrick S. Tracey
617-918-7618 (Tel.)
617-918-7878 (Fax)
Patrick.tracey@piblaw.com
www.piblaw.com

December 14, 2018

VIA FIRST CLASS MAIL and EMAIL

Brian J. Wassar, Esq.
Realty Esquire, PC
P.O. Box 151
W. Hyannisport, MA 02672

Re: *Scott C. Smith v. JPMorgan Chase Bank, N.A., et al.*
Civil Action No.: 1872-CV-404

Dear Attorney Wassar:

Enclosed pursuant to Superior Court Rule 9A please find the finalized JPMorgan Chase Bank, N.A.'s Motion to Stay Discovery in the above referenced matter.

If you wish to file an opposition to the Motion, please forward the same to my attention in accordance with Superior Court Rule 9A.

Thank you for your attention to this matter.

Sincerely,

Patrick S. Tracey
Patrick S. Tracey

PST/at
Enclosure

Boston Office
One Financial Center - Boston, MA 02111 - 617.918.7600

BOSTON - CHICAGO - NEW JERSEY - NEW YORK - ORANGE COUNTY - PHILADELPHIA

PARKER IBRAHIM & BERG LLP

Patrick S. Tracey
617-918-7613 (Tel.)

617-918-7878 (Fax)

Patrick.tracey@piblaw.com

www.piblaw.com

December 13, 2018

VIA FIRST CLASS MAIL and EMAIL

Brian J. Wasser, Esq.

Realty Esquire, PC

P.O. Box 151

W. Hyannisport, MA 02672

Re: *Scott C. Smith v. JPMorgan Chase Bank, N.A., et al.*
Civil Action No.: 1872-CV-404

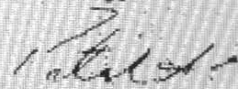
Dear Attorney Wasser:

Enclosed pursuant to Superior Court Rule 9A please find JPMorgan Chase Bank, N.A.'s Motion to Stay Discovery in the above referenced matter.

If you wish to file an opposition to the Motion, please forward the same to my attention in accordance with Superior Court Rule 9A.

Thank you for your attention to this matter.

Sincerely,



Patrick S. Tracey

PST/at
Enclosure

Boston Office

One Financial Center - Boston, MA 02111 - 617.918.7600

BOSTON - CHICAGO - NEW JERSEY - NEW YORK - ORANGE COUNTY - PHILADELPHIA

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 1872-CV-404

SCOTT SMITH,

Plaintiff

v.

JP MORGAN CHASE BANK, N.A. and
HARMON LAW OFFICES, P.C.

Defendants

JPMORGAN CHASE BANK, N.A.'S MOTION TO STAY DISCOVERY

Defendant, JPMorgan Chase Bank, N.A. ("Chase"), hereby moves this Honorable Court pursuant to Mass. R. Civ. P. Rule 26(c) to stay discovery in this matter. As grounds for this motion, Chase states that discovery is premature because (i) Plaintiff has not served defendant Harmon Law Offices, P.C. ("Harmon") with the Complaint; (ii) Chase will file a Motion to Dismiss the First Amended Complaint the week of December 17, 2018; and (iii) Plaintiff has indicated that he may file a Second Amended Complaint. For these reasons Chase respectfully requests that this Honorable Court stay discovery in this matter until after Plaintiff serves Harmon with the Complaint and until after the Court rules on Chase's Motion to Dismiss. Plaintiff has resided in the estate-like subject property in Osterville for years without making a single mortgage payment to Chase, and will not be prejudiced if the Court stays discovery. On the other hand, if the motion is denied Chase will face the burden and great expense of responding to broad discovery requests served by Plaintiff.

PROCEDURAL HISTORY

On or about July 30, 2018, Plaintiff Scott C. Smith ("Plaintiff") filed a Complaint (the "Complaint") against Chase and Harmon in Barnstable Superior Court, Massachusetts alleging various claims in connection with a foreclosure of real property located at 230 Starboard Lane, Osterville, Massachusetts (the "Property"). Chase removed the case to the United States District Court for the District of Massachusetts on August 7, 2018. On or about September 5, 2018, Plaintiff filed his First Amended Complaint in the United States District Court for the District of Massachusetts. Plaintiff also moved to remand and the Court remanded the case back to Barnstable Superior Court on September 12, 2018 for lack of diversity jurisdiction holding that Harmon is a citizen of Massachusetts. Notably, Harmon has yet to be served in this case despite an Assented-to Motion between Chase and Plaintiff to enlarge time to serve Harmon up to January 30, 2019.

On October 1, 2018, Plaintiff propounded discovery on Chase, including Requests for Production of Documents, Interrogatories, and Requests for Admissions. On November 6, 2018, Plaintiff also served Chase with a Mass.R.Civ.P. 30(b)(6) deposition notice ("Deposition Notice"). Furthermore, the Deposition Notice is overly broad, general and vague in many areas. Many of the areas of inquiry in the Deposition Notice have no bearing or relevance to the case at issue. Overall, the requests for discovery are onerous and would place a significant burden on Chase even before Chase has an opportunity to file a responsive pleading. As such, Plaintiff's discovery requests are untimely, overbroad and unnecessary at this point in the litigation.

STANDARD OF REVIEW

Rule 26(c) gives the Court a number of possible options in considering a motion for a protective order, including: "(1) that discovery not be had; [or] (2) that discovery may be had

only on specified terms and conditions, including a designation of the time or place." *Chesapeake Inv. Servs., Inc. v. Olive Grp. Corp.*, C.A. No. 022654BLS, 2002 WL 31379955, at *2 (Mass. Super. Sept. 13, 2002) citing *Wansong v. Wansong*, 395 Mass. 154, 156 (1985).

"In determining whether a protective order should issue, a judge must assess the competing interests of preventing 'annoyance, embarrassment, oppression, or undue burden or expense,' ... and considerations of an efficient and just resolution of the action ... 'In making this assessment [a judge is] entitled to a broad measure of discretion.'" *Id.* Litigants may be denied an opportunity for discovery if their complaints and affidavits have "not made even a minimal showing warranting the requested discovery." *E.A. Miller, Inc. v. S. Shore Bank*, 405 Mass. 95, 100 (1989) citing *MacKnight v. Leonard Morse Hosp.*, 828 F.2d 48, 51 (1st Cir.1987) ("[D]iscovery cannot be used as a vehicle for discovering a right of action.").

ARGUMENT

At the present time, discovery is premature and inappropriate. Accordingly, discovery should be stayed until after Plaintiff has effected service of the operative complaint, and until after the parties have responded to same.

Indeed, Plaintiff has filed a First Amended Complaint but, to date, Plaintiff has failed to serve the operative complaint on co-defendant Harmon. Moreover, to date, Chase has yet to file a response to Plaintiff's First Amended Complaint based on past representations by Plaintiff that he intends to file a Second Amended Complaint. Yet, despite this, Plaintiff has propounded discovery requests, inclusive of interrogatories, requests for production, requests for admissions and a corporate deposition notice on Chase.

Despite Plaintiff's representation that he intends to file a Second Amended Complaint, Chase intends to file a Motion to Dismiss the First Amended Complaint during the week of

December 17, 2013. Chase believes that through its dispositive motion, Plaintiff's causes of action as to Chase will be dismissed. Alternatively, if the Court does not dismiss Plaintiff's causes of action as to Chase in their entirety, Chase believes that the Court will dismiss the majority of Plaintiff's claims that would, undoubtedly, alter the scope of discovery in this matter moving forward.

Accordingly, to avoid conducting any unnecessary, costly and wasteful discovery in this matter, Chase respectfully requests that this Honorable Court stay all discovery until after the Court rules on Chase's dispositive motion, and until after co-defendant is served with the operative Complaint. In filing the instant motion, Chase notes that no party will be prejudiced by staying discovery. Indeed, to the contrary, both Chase and Harmon stand to be prejudiced if forced to engage in discovery at the present time.

Chase has not filed a responsive pleading to Plaintiff's Complaint or First Amended Complaint due to Plaintiff's counsel's assertions that a Second Amended Complaint would be filed with the Court. In fact, during oral argument in federal Court, Plaintiff's counsel again stated in during the hearing to remand the case that he would be filing a Second Amended Complaint. To date, Plaintiff has still not filed a Second Amended Complaint that would provide Chase with the prospect to evaluate and assess Plaintiff's claims. Should Plaintiff file a Second Amended Complaint, this would provide Chase an opportunity to more fully identify the scope of Plaintiff's amended allegations. Conducting discovery at this point in the litigation is premature and untimely as Chase has not had the ability to fully assess Plaintiff's claims.

Furthermore, service has still not been effectuated on Harmon, a named Defendant in Plaintiff's Complaint and First Amended Complaint. In the interest of fairness, discovery should be stayed when and until all the parties have been served with Plaintiff's Second Amended

Complaint. A stay of discovery would be in the interest of all parties to narrow the case issues in order for the parties to provide complete responses to discovery requests.

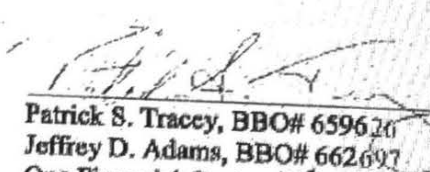
Moreover, to promote judicial economy and avoid prejudice to any party, and to allow Chase to appropriately respond to Plaintiff's Second Amended Complaint, a stay of discovery is warranted. Chase's request for a stay of discovery pending the filing of Plaintiff's Second Amended Complaint is reasonable. Chase may file a responsive pleading to the Plaintiff's Complaint that may obviate the need for discovery and/or the deposition of Chase. Chase should not be required to incur the significant expense of preparing discovery at this juncture in the litigation, as well presenting a witness for deposition. Indeed, staying discovery in this matter until after Chase has the opportunity to respond to Plaintiff's Second Amended Complaint will not prejudice any party, and will likely achieve judicial economy for the Court.

CONCLUSION

For the foregoing reasons, Chase respectfully requests that the Court stay discovery in this matter until after it rules on Chase's Motion to Dismiss, and until after Plaintiff serves co-defendant Harmon with the operative complaint.

Date: December 13, 2018

Respectfully submitted,
PARKER IBRAHIM & BERG LLP
Attorneys for Plaintiff,
JPMorgan Chase Bank, N.A.


Patrick S. Tracey, BBO# 659620
Jeffrey D. Adams, BBO# 662697
One Financial Center, 15th Floor
Boston, MA 02111
Phone: 617-918-7613
Facsimile: 617.918.7878
Email: Patrick.tracey@piblaw.com
Jeffrey.adams@piblaw.com